IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.704 OF 2005

ALONG WITH

CIVIL APPLICATION NO.1739 OF 2005

Smt.Bharati Prakash Jadhav & Ors. ...Appellants

Versus

Maharashtra Housing & Area Development Authority (MHADA) & Ors. ...Respondents

.....

Mr.Santosh Shetty i/b M.P.Vashi & Assocaites for Appellants.

Mr.G.W.Mattos for Respondents 1 & 2.

Mr.Ashish S.Naik for Respondent No.3.

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CORAM: A.M.KHANWILKAR, J.

JANUARY 23, 2006.

P.C.

1. Heard Counsel for the parties. Perused the relevant record produced before me by the parties.

2. Admit. Mr.Mattos waives notice for Respondents 1 & 2. Mr.Naik waives notice for

Respondent No.3.

3. As short question is involved, Appeal is taken up for final hearing forthwith, by consent.

4. For the nature of order that I propose to pass, it is unnecessary to advert to all the events which have led to the filing of the Suit and passing of the impugned decision. Suffice it to observe that the Appellants claim that they are in lawful possession of the disputed premises. That position is, however, contested by Defendant No.3. According to Defendant No.3, the Appellants have no concern with the disputed premises.

5. On fair reading of the impugned decision of the Trial Court, it is seen that the Trial Court has answered the issue in favour of Defendant No.3 by relying on the order passed by the competent Authority dated 2nd July 1990. In Para 27 of the impugned Judgment, the Trial Court has categorically observed that by the order passed by the competent Authority dated 2nd July 1990, the objection taken by Defendant No.3 to the claim of

the Appellants for regularisation, was allowed, for which reason, regularisation in favour of the occupants/Appellants could not be done. Copy of the order dated 2nd July 1990 passed by the Competent Authority which was on record before the Trial Court has been produced before me. Even on fair reading of the said order, it is not possible to uphold the finding recorded by the Trial Court in Para 27 of the impugned Judgment as referred to above. Even Counsel for the Defendant No.3 fairly accepts this position; for, by the said order, the competent Authority has expressed prima facie opinion and issued show cause notice to all concerned. It is not an order of allowing the objection taken by the Defendant No.3 as such. This is the basis on which the Trial Court proceeded to answer the issue against the Appellants and in favour of the Defendant No.3.

6. As the basis is wrong, the impugned Judgement cannot be sustained and will have to be set-aside. On doing so, this Court will have to reappreciate the evidence on record to decide the controversial issue. Instead of that, in my

opinion, in the interest of justice, the parties will have to be relegated before the Trial Court for considering the entire controversy afresh in accordance with law. As the impugned Judgment is being set-aside and the matter is remanded to the Trial Court, all issues including issues regarding maintainability of the Suit are left open, to be decided afresh. This is so because the Trial Court has answered the issue of maintainability of suit in the context of not giving prior statutory notice under Section 173 of MHADA. The grievance of the Appellants is that there was evidence on record that in view of the urgency, the Appellants were required to invoke the jurisdiction of Civil Court and the notice under Section 173 of the Act was waived by the conduct of the Authorities, which evidence has not been considered by the Trial Court in Para 23 of the impugned Judgment.

7. As mentioned earlier, the Trial Court will therefore decide the issue of maintainability of Suit in view of mandate of Section 173 of the Act. In addition, the Trial Court shall also consider the issue of maintainability of the Suit in view of

Section 71 of the Act, which issue is raised by the Counsel appearing for the Authority before this Court. If such issue is not specifically raised in the written statement, it will be open for the parties to amend the pleadings and adduce such further evidence, as may be necessary with the permission of the Trial Court.

8. Accordingly, this Appeal succeeds. The impugned Judgment and Order is set-aside in toto. Accompanying Civil Application is also disposed of.

9. The Suit is restored to the file of the Trial Court, to be proceeded with, in accordance with law. If necessary, the Trial Court may permit the parties to amend the pleadings and adduce further evidence as may be warranted. The Trial Court shall decide the Suit as expeditiously as possible, preferably by end of December 2006. All questions are left open.

10. During the pendency of the Suit, interim protection which was granted to the Appellants with regard to the suit structure shall continue till

the same is modified or vacated by the Trial Court for such reasons as may be permissible in law.

11. Parties to appear before the Trial Court on 16th February 2006 so as to facilitate the Trial

Court to issue appropriate directions regarding the further trial as may be required.

12. Issuance of certified copy is expedited.

A.M.KHANWILKAR, J.